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Supreme Court of the United States

October Term, 1978

No. 78-1817

FORD MOTOR CREDIT COMPANY,
Petitioner,

v.

COLONIAL FORD, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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July 1979

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BRIEF IN OPPOSITION

This Brief is filed in opposition to the Petition for Certiorari, seeking to review a decision of the Tenth Circuit holding Ford Motor Credit Company ("Ford Credit"), a wholly-owned and controlled subsidiary of Ford Motor Company ("Ford Motor"), with $7½ Billion or 90 percent of its assets committed exclusively to financing the distribution of Ford cars, is subject to the Automobile Dealers Day In Court Act, 15 U.S.C. § 1221, *et seq.*, ("ADDICA").

QUESTIONS PRESENTED

1. Whether Ford Credit, a wholly-owned and controlled subsidiary of Ford Motor, with $7½ Billion or 90 percent of its assets committed exclusively to financing the distribution of Ford cars, is an entity "which acts for and is under the control of . . . [Ford Motor] in connection with the distribution of . . . [Ford cars]" within the definition of the term "automobile manufacturer" as provided for in Section 1221(a) of ADDICA, 15 U.S.C. § 1221(a).

2. Whether contractual privity is an essential element in determining the applicability of ADDICA under Section 1221(a) of that Act, or an essential element in determining the statutory liability of entities subject to ADDICA, pursuant to Section 1221(a), under the prohibitions of Section 1222 of the Act, 15 U.S.C. § 1222.

3. Whether the written contracts between Ford Credit and the plaintiff, Colonial Ford, providing for the financing of Colonial Ford's capital, wholesale and retail financing requirements with Ford Credit, are written agreements or contracts between Ford Credit and Colonial Ford which purport "to fix the legal rights and liabilities of the parties" to such contracts, within the definition of the term "franchise" as provided for in Section 1221(b) of ADDICA, 15 U.S.C. § 1221(b).

STATUTORY PROVISIONS INVOLVED

Section 1221(a) of ADDICA provides:

> (a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles. 15 U.S.C. § 1221(a).

Section 1221(b) of ADDICA provides:

> (b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract. 15 U.S.C. § 1221(b).

Section 1222 of ADDICA provides in pertinent part:

> An automobile dealer may bring suit against any automobile manufacturer . . . and shall recover the damages by him sustained and the cost of the suit by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer . . . 15 U.S.C. § 1222.

STATEMENT OF THE CASE

1. *Parties.* Colonial Ford, Inc., the plaintiff in the District Court, was a Ford dealer. Mr. LeGrande Belnap was the original owner and sole investor in Colonial. Ford Motor, a defendant, is the nation's second largest automobile manufacturer. The issue decided by the Tenth Circuit focused on the function and relationship of the other defendant, Ford Credit, to Ford Motor.

Ford Credit is a wholly-owned subsidiary of Ford Motor. (309; PX-38.)[1] Eight of Ford Credit's 13 directors are also officers and directors of Ford Motor, including the Chairman of the Board, Henry Ford, and the Chairman of Ford's Dealer Policy Board, Benson Ford. (680-81; PX-38.) Ford Credit alone has assets in excess of $8½ Billion, and 90 percent of those assets, or over $7½ Billion, are invested by Ford Credit exclusively in financing the distribution of Ford cars. (PX-38.) Ford Credit provides capital loans to Ford dealers, wholesale flooring for Ford dealers' new car inventories and retail financing for the sale of cars by Ford dealers to consumers. The financing Ford Credit provides for dealers materially and significantly assists Ford Motor in the distribution of Ford cars. (312.) Ford Credit only provides financing for Ford dealers. (311-12, 486-87.) It does not provide financing for General Motors, Chrysler or American Motors dealers. *Id.*

[1] Page citations are to the Joint Appendix filed in the United States Court of Appeals for the Tenth Circuit. Citation to exhibits are to the exhibit numbers used in the United States District Court, reprinted in volumes 7, 8 & 9 of the Joint Appendix; plaintiff's exhibits are marked PX- ; Ford Motor's exhibits are marked DX- ; and Ford Credit's exhibits are marked DCX- .

2. *Statement of Facts.* Ford Credit's Statement of the Case, in its Petition for Writ of Certiorari, is made without a single citation to the record. While Rule 21 of this Court no longer requires the record to be filed prior to docketing a Petition for Writ of Certiorari, the Rule was not intended to grant a petitioner poetic license. Perhaps, Ford Credit's new counsel lacks familiarity with the 2,500 pages of trial testimony and over 200 trial exhibits; the Petition, however, does not remotely set forth a fair summary of Colonial's ADDICA claim against Ford Credit.

Colonial did not claim, as the Petition for Writ of Certiorari repeatedly states, that Ford Credit, "as a wholly-owned subsidiary of Ford Motor, should have been held liable under the Franchise Act for the conduct of Ford Motor . . . ." (Pet. for Cert. at 7; *See also*, at 15.) Colonial claimed Ford Credit should have been held liable for Ford Credit's own coercive conduct. (990-96.) Colonial claimed Ford Motor and Ford Credit, through a continual course of conduct, had deprived Colonial of the right to run its own business and to control critical aspects of its business, including its management, facilities and finances. (990-91.)

Ford Credit entered the picture in 1972 at a time when Ford Motor was attempting to coerce Colonial to relocate at a Ford Motor selected location. (201-07; PX-7.) Ford Motor pressured Colonial to secure its financing for the new location from Ford Credit. (207.) Colonial resisted because it wanted to purchase a substantially less expensive location (201-02.), and because Colonial wanted to maintain its independent financing sources. (210.)

Ford Credit insisted that if it provided Colonial with capital financing for a new location, Colonial would also have to give Ford Credit its wholesale and retail financing requirements. (210.) Colonial objected to Ford Credit's demand and took the matter up with Ford's district manager, Mr. Parr. Mr. Belnap told Mr. Parr Ford Credit didn't "just want the financing of the building, now he wants me to divest myself of all banking connections and give him the wholesale flooring line and retail contracts." (212.) Mr. Parr replied, "Well, if you have to do it, give it to him. It's all in the Ford family." (212.) Mr. Belnap, nonetheless, continued to resist. *Id.*

On June 2nd, Mr. Parr came to Colonial's office, served Colonial with a notice of termination of Colonial's one-year term franchise, and issued Colonial a three-month franchise, expiring September 15, 1972. (PX-10.) Mr. Parr told Mr. Belnap that he would either have a commitment on the location Ford wanted by September or Colonial would lose its Ford franchise. (214-15.) Mr. Belnap finally capitulated, and Colonial committed to Ford Credit on June 16, 1972. (215-16; PX-11, PX-12, PX-13, PX-14, PX-15.) Ford Credit demanded, as a condition of its capital loan commitment, all of Colonial's wholesale and retail financing requirements. (PX-15, PX-19, PX-20.)

Before being coerced into its commitment with Ford Credit, Colonial had placed very few retail contracts with Ford Credit — 4 in 1969; 25 in 1970; and 9 in 1971. After June of 1972, Colonial placed 202

contracts with Ford Credit in 1972; 415 in 1973; and 550 in 1974. (478-79, 912-13.)

Ford Credit's relationship with Colonial was reflected in numerous written contracts between Colonial and Ford Credit (PX-12, PX-15, PX-19, PX-20, PX-21.), including a wholesale flooring agreement and a capital loan security agreement. (PX-12, PX-20.) Colonial's contracts with Ford Credit were hardly the "garden-variety" arrangements Ford Credit claims. (Pet. for Cert. at 13.) The capital loan agreement not only gave Ford Credit a security interest in Colonial's facilities and real estate, but also gave Ford Credit a security interest in all of Colonial's assets (PX-20.), effectively precluding any other financing relationship for Colonial. The capital loan agreement required Colonial to offer Ford Credit all of Colonial's retail contracts. Specifically, the agreement provided that Colonial was to:

> [o]ffer to FMCC for purchase under FMCC's Retail Plan in effect at the time all retail installment contracts arising out of the sale of goods and services offered for sale by the Borrower in the ordinary course of its business unless the retail purchaser thereof specifically requests otherwise. (PX-20 at ¶ 4.9.)

The financial relationship between Ford Credit and Colonial was not, as Ford Credit claims, "wholly independent of the franchise relationship between Ford Motor and Colonial." (Pet. for Cert. at 12.) Colonial was required to execute an agreement with Ford Motor and Ford Credit requiring Colonial to give Ford Motor the unconditional right to occupy Colonial's new facil-

ities "if for any reason Colonial . . . should cease to be a Ford dealer at the proposed location." (PX-19.) This contractual provision gave Ford absolute control over Colonial's facilities. (434; PX-19.)

After Ford Credit secured control of Colonial's financing requirements, Ford Credit worked with Ford Motor to build Colonial as a volume dealership without regard for Colonial's financial interest. Ford Credit, contrary to its standard procedure, failed to conduct a feasibility study to determine whether Colonial's new facility was within the dealership's financial capability. (489.) Ford Credit financed a build-up in Colonial's new car inventory by exceeding the limits on Colonial's authorized flooring line in amounts of up to $1 Million. (233; PX-72.) When Colonial's increased costs, attributable to its new facility and new car inventory build-up, caused working capital problems, Ford Credit financed Colonial by allowing Colonial to float against Ford Credit. (499-501, 879-82; PX-62, PX-63, PX-64.)

Ford Credit never advised Mr. Belnap Colonial's new car inventory was overline or Colonial was floating against Ford Credit. (233-35.) In fact, as late as July 30, 1974, Ford Credit recommended Colonial's new car flooring line be increased from $1.2 Million to $1.7 Million, and concluded, in an internal memorandum, Colonial had "done a respectable job." (PX-64.)

In August of 1974, however, Ford Credit, without warning, reversed its policy and decided to dry up Colonial's float. (448, 501-02; PX-66, PX-67.) On Aug-

ust 26, 1974, Ford Credit informed Mr. Belnap that Colonial would need $218,000.00 by September 1st. (PX-25.) This was the first time that Mr. Belnap had been informed that Colonial was out-of-trust and that additional cash would be required to operate the dealership. (234-35.) Ford Credit commenced to audit and re-audit Colonial to dry up its float, and on September 10th, when Colonial was unable to pay off a wholesale audit, Ford Credit suspended Colonial's wholesale line. (238, 502-03; PX-68.) Even though Mr. Belnap thereafter resumed active control of the dealership, was able to pay off the out-of-trust condition by September 24, and was never out of trust again, Ford Credit refused to restore Colonial's wholesale line. (239-40, 503.) Unable to finance the purchase of new cars, Colonial's new car inventories shrank month by month, and Colonial commenced to sustain heavy losses. (245-46.) When the District Court, after evidentiary hearing, entered a preliminary injunction restoring Colonial's flooring line, Colonial was virtually out of business. (504.)

3. *Opinions Below.* Colonial Ford's ADDICA claim against Ford Credit presented two fundamental issues — the issue of applicability and the issue of liability. The issue of applicability turned on the questions:

(a) whether Ford Credit was a corporation "which acts for and is under the control of" Ford Motor; and

(b) whether Ford Credit functioned "in connection with the distribution" of Ford cars;

within the definitional language of Title 15 United States Code Section 1221(a). Both of these questions were submitted by the District Court to the jury as questions of fact under an instruction (Instruction No. 32) that in order to find Ford Credit subject to ADDICA:

> you must find by a preponderance of the evidence that under the circumstances of this case . . . Ford Credit acted for Ford Motor. Second, that Ford Credit was under the control of Ford Motor. Third, that the actions of Ford Credit, for and under the control of Ford, were in connection with the distribution of automobiles. (989-90.)

Colonial objected to this instruction on the ground that on the uncontroverted facts Ford Credit acted for and was under the control of Ford Motor in connection with the distribution of Ford cars, and, therefore, Ford Credit was subject to ADDICA as a matter of law.

The United States Court of Appeals for the Tenth Circuit, in its first decision, held, Judge McKay dissenting, that the District Court properly submitted the issue of applicability to the jury as a question of fact. *Colonial Ford, Inc. v. Ford Motor Co.*, 577 F.2d 106 (10th Cir. 1978). On petition for rehearing, granted on the parties' briefs, the Tenth Circuit reversed itself and unanimously held Ford Credit was subject to ADDICA as a matter of law, and remanded the case for a new trial against Ford Credit on the issue of

liability. *Colonial Ford, Inc. v. Ford Motor Co.*, 577 F.2d 106 (10th Cir. 1978); *modified in part on rehearing, Colonial Ford, Inc. v. Ford Motor Co.*, 592 F.2d 1126 (10th Cir. 1979), *reh. denied.*

REASONS FOR DENYING THE WRIT

The whole thrust of Ford Credit's petition is an attempt to confuse the issues of statutory applicability and liability. The question whether Ford Credit "acts for and is under the control of . . . [Ford Motor] in connection with the distribution of . . . [Ford cars]" so as to be subject to ADDICA, presents neither a question of Ford Credit's liability for the coercive conduct of Ford Motor, nor a question of Ford Motor's vicarious liability, on agency grounds, for the conduct of its wholly-owned subsidiary. The question is whether Ford Credit shall be liable for its own coercive conduct under the Act. The question is whether Ford Credit's relationship with Ford Motor, and its function in the distribution of Ford cars, brings it within the plain language of the Automobile Dealers Day In Court Act, and serves the Congressional purpose of redressing the gross imbalance between automobile manufacturer and dealer which so sorely plagued the business independence of thousands of automobile dealers.

Ford Credit's representation to this Court that the decision of the Tenth Circuit, holding Ford Credit subject to ADDICA as a matter of law, conflicts with the decisions of three other circuits is categorically false. The Tenth Circuit's decision does not conflict with a single decision of any circuit, let alone a pattern of

intermediate appellate authority. On the contrary, in holding Ford Credit subject to ADDICA as a matter of law, the Tenth Circuit properly followed the very decision on which Ford Credit relies to support its claim of conflict — *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971).

The Tenth Circuit's decision simply recognizes, as a matter of economic reality, that the commitment of $7½ Billion exclusively to the financing of Ford dealers serves the distributive purposes of the automobile manufacturer and substantially augments its economic power in relationship to its independent dealers. The deployment of such massive financing by an automobile manufacturer in its business relations with its dealers brings such financing within the terms and purposes of the Act. Ford Credit's position is that if the financing relationship Ford has employed with Ford dealers is not within the four corners of a Ford Sales and Service Agreement, it is beyond the scope of ADDICA. If Ford's Sales and Service Agreement provided that Ford would furnish all of a dealer's financing requirements, would there be any question that ADDICA extended to the financial aspects of Ford's relationship with its dealers? If Ford's Sales and Service Agreement with Colonial had provided that (1) Colonial would obtain all of its financing requirements from Ford, including its wholesale flooring, (2) Colonial was required to place its retail contracts on the sale of new cars with Ford, (3) granted Ford a lien on all of Colonial's assets, and (4) granted Ford the right to operate a Ford dealership at Colonial's facilities if Colonial "for any reason" ceased being a Ford dealer, would

there be any question that ADDICA extended to those financial aspects of the Ford/Colonial relationship? Does it make any difference, under ADDICA, that Ford achieved the same ends through a wholly-owned subsidiary and separate pieces of paper? Ford Credit repeatedly claims a financial relationship is independent of a franchise relationship, but if the automobile manufacturer has made a financial relationship part and parcel of the franchise relationship, then the financial aspects of the franchise relationship are entitled to the Congressionally-intended protection of ADDICA.

The issue in this case is simply whether ADDICA applies to a wholly-owned subsidiary whose purpose and function is to facilitate the distribution of cars manufactured by its parent. The clear language and purpose of the Act command that application.

1. *Ford Credit "acts for and is under the control" of Ford.*

The plain language of Section 1221(a) makes ADDICA applicable to any corporation "which acts for and is under the control" of any automobile manufacturer. The courts have uniformly held ownership of a subsidiary by an automobile manufacturer establishes the requisite control. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971); *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437 (1st Cir. 1966), *cert. denied*, 385 U.S. 919 (1966); *DeCantis v. Mid-Atlantic Toyota Distributors, Inc.*, 371 F. Supp. 1238 (E.D. Va. 1974); *Barney Motor Sales v. Cal Sales, Inc.*, 178 F. Supp. 172 (S.D. Cal.

1959). Furthermore, the courts have held the question of control turns not on whether the parent manufacturer has in fact controlled the relationship of the subsidiary with regard to a particular dealer, but whether the manufacturer has the power to control. Thus, the First Circuit has held "[i]t was not error to exclude defendant's proffered evidence as to the manufacturer's actual involvement with plaintiff's franchise. What matters is that it had the power." *Volkswagen Interamericana, S.A. v. Rohlsen, supra* at 442.

The Tenth Circuit, in its first decision, diverged from this uniform line of authority and held "[t]he 'acts for' or 'under the control' provisions must relate to the transactions or circumstances out of which the cause of action arose." *Colonial Ford, Inc. v. Ford Motor Co.*, 577 F.2d 106, 108 (10th Cir. 1978). On rehearing, the Court rejected this particular circumstances test and held a wholly-owned subsidiary of the manufacturer acts for and is under the control of a manufacturer within the Act as a matter of law. *Colonial Ford, Inc. v. Ford Motor Co.*, 592 F.2d 1126, 1128-29 (10th Cir. 1979). The Circuit's decision on rehearing, in accord with the uniform state of authority, focused on the "fundamental relationship between the parent and the subsidiary." *Id.* at 1129-1130.

The very case Ford Credit urges as establishing a conflict with the Tenth Circuit's decision, on the contrary, rejected a transactional analysis and likewise held the parent-subsidiary relationship established the requisite control as a matter of law. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786

(5th Cir. 1971). In *York*, Chrysler marketed its cars through a wholly-owned subsidiary, Chrysler Motors. Chrysler had not, in any way, controlled Chrysler Motors' conduct with the plaintiff dealer. The court nevertheless held that Chrysler Motors was subject to the Act, stating "[c]learly both Chrysler Corporation and Chrysler Motors are automobile manufacturers as defined in the Act. Chrysler Motors is such because it is a 'corporation which acts for and is under the control of . . . [Chrysler Corporation] . . .'" *Id.* at 791. The court specifically distinguished between the issue of applicability and liability. The question is not whether the parent is liable for the acts of the subsidiary, the question is whether the parent's power to control subjects the subsidiary to the Act.

Any requirement in addition to the parent-subsidiary relationship would only fragment and frustrate the Congressional policy of prohibiting coercion in the economically imbalanced relationship between manufacturer and dealer. If total corporate ownership does not establish the "acts for and under control" requirements of the statute, the application of the Act would vary from case to case. More importantly, what additional proof could be offered in most cases to show that a manufacturer controls its subsidiary? Historically, automobile manufacturers, such as Chrysler and American Motors, have, in fact, marketed their automobiles through wholly-owned subsidiaries. The manufacturer assigns the subsidiary the responsibility of distribution and only generally controls that function through its corporate ownership. The manufacturer does not exercise operational control of the subsidiary's marketing

responsibility, let alone actually control the subsidiary's relationship with a particular dealer. If the power to control, inherent in the parent-subsidiary relationship, does not satisfy the control requirements of the Act, such a subsidiary would be removed from the coverage of the Act merely by the intracorporate division of a manufacturer's economic power, and Congress' purpose in redressing the economic imbalance between manufacturer and dealer would be thwarted.

2. Ford Credit's $7½ Billion financing of Ford dealers is "in connection with the distribution" of Ford cars.

The plain language of the statute makes it applicable to any automobile manufacturer's subsidiary which functions "in connection with the distribution" of the manufacturer's automobiles. The phrase, as the Tenth Circuit noted, is an "inclusive definition." It is not limited by its terms to distribution subsidiaries. The statute does not provide that only controlled entities which are "engaged in distribution" shall be subject to the Act; rather it extends the Act's coverage to controlled entities which function "in connection with the distribution" of a manufacturer's cars.[2]

Not one circuit case has ever held that a wholly-owned credit subsidiary of an automobile manufacturer is beyond the Act's coverage. The cases cited by Ford

[2] As the Court has noted, "[t]his Court naturally does not review congressional enactments as a panel of grammarians; but neither . . . [does the Court] regard ordinary principles of English prose as irrelevant to a construction of those enactments." **Flora v. United States**, 362 U.S. 145, 150 (1960).

Credit do not factually or analytically involve a credit subsidiary of an automobile manufacturer. *Marquis v. Chrysler Corp.*, 577 F.2d 624 (9th Cir. 1978); *Lawrence Chrysler Plymouth, Inc. v. Chrysler Corp.*, 461 F.2d 608 (7th Cir. 1972); *Stansifer v. Chrysler Motors Corporation*, 487 F.2d. 59 (9th Cir. 1973); *Joe Westbrook, Inc. v. Chrysler Corp.*, 419 F. Supp. 824 (N.D. Ga. 1976). Whereas in *York*, the Fifth Circuit held that the Act was applicable to the coercive conduct of Chrysler's credit subsidiary. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786, 792, n.6 (5th Cir. 1971).

The distribution of automobiles involves more than merely their sale and transportation. It also involves financing such distribution, and that is precisely why Ford has established a subsidiary with $7½ Billion committed exclusively to the financing of Ford dealers. The Tenth Circuit's conclusion, that the business purpose and function, served by a resource commitment of that magnitude, is "in connection with the distribution of" Ford cars, simply accords with economic reality.

The inclusion of such a commitment within the scope of the Act also accords with the statute's conceded purpose. Congress found that while automobile dealers "were ostensibly independent businessmen, the factory dominated and controlled almost every phase of their operations at all times. The conflict of interest between factory and dealer is a conflict between parties of totally unequal economic power" [S. Rep. No. 2073, 84th Cong., 2d Sess. 2 (1956)], and Congress' purpose

in enacting ADDICA was to redress that imbalance. *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 515 (10th Cir. 1976); *Barney Motor Sales v. Cal Sales, Inc.*, 178 F. Supp. 172, 174-75 (D.C. Cal. 1959); *DeCantis v. Mid-Atlantic Toyota Distributors, Inc.*, 371 F. Supp. 1238, 1241 (E.D. Va. 1974); *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971); *American Motors Sales Corp. v. Semke*, 384 F.2d 192 (10th Cir. 1967). Financing a dealer's capital, wholesale and retail financing requirements obviously increases the manufacturer's power with regard to a dealer, and the commitment of $7½ Billion exclusively to Ford dealers demonstrates that Ford dealers are dependent on Ford Credit for their financing. Indeed, it was the risk of Ford's abusing this concentration of power in relation to Ford dealers that gave rise to the government's consent decree against Ford and Ford Credit. *United States v. Ford Motor Co.*, Civil Action No. 8 (N.D. Ind., filed Nov. 15, 1938), *modified*, 1953 Trade Cas. (CCH) ¶67,437 (N.D. Ind. 1953). If Congress' purpose was to redress the disparity in economic power between manufacturer and dealer, it certainly did not intend to immunize major segments of a manufacturer's power from the reach of the Act. Coercion upon a dealer can be imposed through the financing relationship just as it can be imposed through the supply relationship. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971). Clearly Congress did not intend to cover one aspect of an automobile manufacturer's power with regard to a dealer and not the other. If Ford has made financing an in-

tegral part of the manufacturer-dealer relationship, the protection afforded by the Act should be co-extensive with the economic power the manufacturer inserts into that relationship.

3. *Contractual privity is not an essential element in determining either applicability or liability under ADDICA.*

Despite Ford Credit's repeated assertions, it is clear from the language of ADDICA that contractual privity between manufacturer and dealer is not a prerequisite to the Act's applicability. Section 1221(a) governs the determination of which entities are to be subject to the Act as "automobile manufacturers," and there is no mention of contractual privity within that section. Furthermore, no Federal Court has ever held contractual privity an essential element of the Act's applicability. *Accord. York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971).

The majority of courts, moreover, hold that contractual privity is not an essential element of liability under Section 1222 of the Act. *Rea v. Ford Motor Co.*, 497 F.2d 577 (3d Cir. 1974); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965); *DeCantis v. Mid-Atlantic Toyota Distributors, Inc.*, 371 F. Supp. 1238 (E.D. Va. 1974); *Barney Motor Sales Corp. v. Cal Sales, Inc.*, 178 F. Supp. 172 (S.D. Cal. 1959). This rule has been applied so as to permit actions under Section 1222 by plaintiffs and against defendants who were not parties to the franchise agreement. Section

1222, in setting forth the standards of liability under ADDICA, prohibits:

> failure . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer . . . 15 U.S.C. § 1222.

These cases hold that so long as there is a franchise agreement, an action may be maintained by or against persons or entities affiliated with the parties to the franchise. The rationale is that it was Congress' purpose to provide a comprehensive prohibition against manufacturer coercion in dealer relations, regardless whether the manufacturer's economic power was divided among corporate affiliates. These courts have found that "the essence of the Act . . . was to provide that this chain of domination, whether forged of one link or of many, was to be broken." *Barney Motor Sales v. Cal Sales, Inc.*, 178 F. Supp. 172, 175 (S.D. Cal. 1959).

The rejection of contractual privity as an essential element of liability is likewise in accord with the legislative history. Congress' purpose was to provide dealers with a statutory right of action regardless of formal contractual requirements. *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437 (1st Cir. 1966); *DeCantis v. Mid-Atlantic Toyota Distributors, Inc.*, 371 F. Supp. 1238 (E.D. Va. 1974); *Barney Motor Sales v. Cal Sales, Inc.*, 178 F. Supp. 172 (S.D. Cal. 1959). Congress was highly critical of the one-sided nature of automobile manufacturers' contracts with their dealers

[S. Rep. No. 2073, 84th Cong., 2d Sess. (1956)], and the House Report states:

> This bill assures the dealer an opportunity to secure a judicial determination, irrespective of the contract terms, as to whether the automobile manufacturer has failed to act in good faith . . . H. R. Rep. 2850, 84th Cong., 2d Sess. 4600 (1956).

Congress thus, was concerned with protecting automobile dealers against manufacturer coercion irrespective of any contractual limitation.

If a franchise relationship exists between automobile manufacturer and dealer, but the manufacturer has divided its economic power and functions among corporate affiliates, what purpose is served by requiring contractual privity with each corporate affiliate? Take the case of Chrysler and Chrysler Motors where the automobile manufacturer has divided its economic power and functions between a parent manufacturer and a wholly-owned subsidiary distributor. Both companies are subject to the Act. Both companies are prohibited from engaging in coercion in their dealer relations. If a Chrysler franchise relationship exists, what difference does it make whether Chrysler or Chrysler Motors is the contracting party. Both, under the terms and purposes of the Act, should be liable for their own coercion in that franchise relationship. Indeed, the cases relied upon by Ford Credit are wholly consistent with this analysis. *Marquis v. Chrysler Corp.*, 577 F.2d 624 (9th Cir. 1978); *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971).

In those cases, which in fact involved Chrysler and Chrysler Motors, Chrysler not only was not a signatory to the franchise agreement, but also had not had any direct dealings, let alone coercive dealings, with the complaining dealer. The Ninth Circuit made the distinction:

> The question remains, however, whether Chrysler Corporation can be liable for noncompliance with, or termination of, the franchise agreement in the absence of contractual privity or some dealing with Marquis. *Marquis v. Chrysler Corp.*, *supra* at 629. (Emphasis supplied.)

The Ninth Circuit acknowledged that contractual privity would not be a requirement of liability if Chrysler had dealt directly and coercively with the plaintiff. *Id.* The Ninth Circuit thus holds that a corporate affiliate of a franchisor is liable for its own coercive conduct regardless of contractual privity. Colonial in this case only sought to impose liability on Ford Credit for Ford Credit's own coercive conduct, and under either line of authority, contractual privity would not be an essential element.

4. *Even if contractual privity is an essential element of liability, Ford Credit and Colonial were in contractual privity to written "franchise" contracts within the meaning of the Act.*

Colonial's business relationship with Ford Credit was reflected in various written contracts between Ford Credit and Colonial that were "franchise" agreements within the definitional language of the Act. 15 U.S.C. 1221(b). The Act defines the term "franchise" to mean:

> the written agreement or contract between any automobile manufacturer . . . and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract. 15 U.S.C. 1221(b).

Colonial's contracts with Ford Credit included a wholesale flooring agreement for Colonial's flooring requirements (PX-12, PX-13, PX-14.), a capital loan agreement and trust deed which granted Ford Credit a security interest in all of Colonial's assets and required Colonial by its express terms to place its retail contracts with Ford Credit (PX-20, PX-21.), and a tri-party agreement between Colonial, Ford Motor and Ford Credit which gave Ford the right to occupy Colonial's new facilities "if, for any reason, Colonial . . . should cease to be a Ford dealer . . . ." (PX-19.)

The Tenth Circuit's conclusion that these agreements constituted contractual relations subject to the Act is correct. *Colonial Ford, Inc. v. Ford Motor Company*, 592 F.2d 1126, 1129, n. 4 (10th Cir. 1979). The language of Section 1221(b) contains no subject matter restriction on the contracts which are to be included within the term "franchise" and it has been held that the word "franchise" is not restricted to a single document, but includes all contracts which relate to the manufacturer-dealer relationship. *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965). There is no question that if the terms of the agreements between Colonial and Ford Credit had been included in the agreements between Colonial and Ford Motor, Ford Motor would have been liable for its coercion in connection with the business relationship reflected in those

agreements. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971). The Tenth Circuit's conclusion that a Ford subsidiary is similarly subject to liability for its coercion does not warrant the exercise of this Court's certiorari jurisdiction.

CONCLUSION

The Petition for Certiorari should be denied.

DATED this 30th day of July, 1979.

Respectfully submitted,

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